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# APPENDIX

# Supreme Court of the United States

TERM, 1971

**No. 70-5122**

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DENNIS STEPHEN DUNCAN,

*Petitioner,*

—v.—

TENNESSEE,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF TENNESSEE
MIDDLE DIVISION

---

PETITION FOR CERTIORARI FILED APRIL 17, 1971
CERTIORARI GRANTED OCTOBER 12, 1971

# Supreme Court of the United States

TERM, 1971

## No. 70-5122

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DENNIS STEPHEN DUNCAN,

*Petitioner,*

—v.—

TENNESSEE,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF TENNESSEE
MIDDLE DIVISION

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## DOCKET ENTRIES

| DATE | PROCEEDINGS |
|---|---|
| 1968 | |
| 4- 2 | Warrant issued. |
| 4-12 | Preliminary hearing; bound to Grand Jury. |
| 6-13 | Indictment returned. |
| 7-16 | Jury selected and sworn; Defendant waives formal arraignment; testimony begun; Defendant moves to surpress certain evidence and motion sustained; State moved for directed verdict; jury directed to acquit Defendant of charge; and jury acquitted Defendant. |
| 7-16 | Warrant re-issued for Defendant. |
| 7-17 | Second preliminary hearing held; plea of former jeopardy overruled; Defendant bound to Grand Jury. |
| 7-17 | Writ of habeas corpus filed. |
| 7-19 | Writ heard and overruled. |
| 9- 4 | Assignments of error filed with Tennessee Court of Criminal Appeals. |
| 11- 8 | Writ heard by Tennessee Court of Criminal Appeals. |
| 12-13 | Judgment of Criminal Court of Montgomery County affirmed by Tennessee Court of Criminal Appeals as to writ. |
| 12-20 | Written plea as to former jeopardy filed. |
| 1969 | |
| 2-10 | Amended plea of former jeopardy and plea of not guilty filed. |
| 3-17 | Answer to plea filed. |
| 3-18 | Plea of double jeopardy overruled and trial begun. |
| 3-19 | Jury convicted Defendant of armed robbery. |

| DATE | PROCEEDINGS |
|---|---|
| 1969 | |
| 3-27 | Motion for new trial filed. |
| 4- 4 | Motion for new trial denied. |
| 5- 7 | Record filed with Tennessee Court of Criminal Appeals. |
| 10- 6 | Case argued before Tennessee Court of Criminal Appeals. |
| 1970 | |
| 4- 4 | Tennessee Court of Criminal Appeals reversed and dismissed with one Judge dissenting. |
| 5-16 | Petition of writ of certiorari filed on behalf of the State. |
| 6-15 | Petition for writ of certiorari granted. |
| 9- 3 | Oral arguments heard. |
| 10- 5 | Tennessee Supreme Court reversed judgment of Court of Criminal Appeals. |
| 10-15 | Petition to rehear on behalf of Dennis S. Duncan filed. |
| 1971 | |
| 1-18 | Petition to rehear denied. |
| 4-17 | Motion for leave to proceed in forma pauperis and petition for writ of certiorari docketed in the United States Supreme Court. |
| 10-12 | Motion for leave to proceed in forma pauperis granted, and petition for writ of certiorari granted. |

STATE OF TENNESSEE
MONTGOMERY COUNTY

---

CRIMINAL COURT OF MONTGOMERY COUNTY

JUNE TERM, 1968

The Grand Jurors for the State of Tennessee, duly elected, impaneled, sworn, and charged to inquire for the body of the County of Montgomery, and State aforesaid, upon their oath aforesaid, present: That Dennis Stephen Duncan; Richard A. Brooks heretofore, and prior to the finding of this indictment, to-wit: on the 10th day of March, 1968, with force and arms, in the County aforesaid, unlawfully and feloniously did make an assault upon the body of one Johnny Bryant, and him the said Johnny Bryant, then and there unlawfully and feloniously put in fear and danger of his life, and then and there unlawfully, feloniously, and violently did steal, take, and carry away from the person and against the will of the said Johnny Bryant, certain personal property, to-wit: approximately $70.00 good and lawful currency of the United States of America of the value of $70.00 DOLLARS the property of the RED ACE PETROLEUM COMPANY, A CORPORATION, said robbery being accompanied by the use of a deadly weapon, to-wit: A Gun to-wit: a pistol; contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State of Tennessee.

/s/ Noel R. Bagwell
Attorney General

18182

ARMED ROBBERY

STATE

*vs*

DENNIS STEPHEN DUNCAN, RICHARD A. BROOKS

KENNETH ALBRIGHT
Prosecutor

WITNESSES SWORN:

Josephine F. Hinton
Kenneth Albright
Johnny Bryant

/ A TRUE BILL

/s/ [Illegible]
Foreman Grand Jury

TO THE CLERK:

Summon the fol'owing witnesses for the State:

Kenneth Albright
W. R. James
James Bryant
James Sewell
Johnny Bryant 5-9600
Herbert Hinton 5-5696
William Tate 291-7700
Mrs. H. Hinton 5-5696

/s/ Noel R. Bagwell
Attorney General

IN THE CRIMINAL COURT
FOR MONTGOMERY COUNTY
TENNESSEE, AT CLARKSVILLE

#13-182—Armed Robbery

[Filed 7-25-68, Howell C. Smith, Jr., Circuit Court Clerk, by /s/ Rachel Phipps, D.C.]

STATE OF TENNESSEE

*vs.*

DENNIS STEPHEN DUNCAN and RICHARD A. BROOKS

Came the Attorney General on behalf of the State and the Defendants, in person and by counsel, and they being arraigned at the bar, pleaded not-guilty as charged in the indictment and for their trial place themselves on the country and the Attorney General doth the like, and whereupon to try this cause came a jury of good and lawful men, citizens of Montgomery County, to wit:

| | |
|---|---|
| James C. Bunnell, Jr. | Jimmy P. Dark |
| George Barbee | Forest Suiter |
| William R. White | John B. Settle |
| Charles M. Keel | Jeffrey R. Harp, Jr. |
| Billy E. Jackson | Edgar P. Hogue |
| William J. Ireland | John H. Key |

who being duly elected, impaneled and sworn to truly try the issues join in this cause and true deliverance make according to law and evidence, and sits in the jury box.

At the conclusion of the State's proof, the State moves the Court to instruct the jury to find for the Defendants and return a verdict of not-guilty as the State is not prepared to prove a pistol was used in the robbery. Your Honor is pleased to grant said request and explains to the jury as follows:

"Gentlemen of the jury, the State in this case by indictment charge the Defendants with Armed Rob-

bery stating in the indictment that said robbery was accomplished by the use of a deadly weapon, to wit: a gun, to wit: a pistol and the State has now moved the Court for a directed verdict by the jury, it appearing that the indictment in stating that the deadly weapon was a pistol is in error and the State is unprepared to proceed any further because of the fact that an error has been made in the indictment and it should have been a rifle instead of a pistol. Now then, the State has moved that the jury be directed to find or to acquit the Defendant of that charge because of that particular, which I have explained to you and the Court is directing you then to find, or to acquit the Defendants of the charge in view of that error in the indictment."

Whereupon, the jury consider of their verdict, and after due consideration thereof, they return into open Court, and asked if they agreed, they say upon their oaths that they find the Defendants, Dennis Stephen Duncan and Richard A. Brooks, not guilty.

/s/ Sam E. Boaz
SAM E. BOAZ

Approved for entry:

/s/ Noel R. Bagwell
NOEL BAGWELL
Attorney General

/s/ Brandon Ingham
BRANDON INGHAM
Attorney for Richard A. Brooks

/s/ Rodger N. Bowman
RODGER N. BOWMAN
Attorney for Dennis Stephen Duncan

STATE OF TENNESSEE
MONTGOMERY COUNTY

CRIMINAL COURT OF MONTGOMERY COUNTY

AUGUST TERM, 1968

The Grand Jurors for the State of Tennessee, duly elected, impaneled, sworn, and charged to inquire for the body of the County of Montgomery, and State aforesaid, upon their oath aforesaid, present: That Dennis Stephen Duncan, and Richard A. Brooks heretofore, and prior to the finding of this indictment, to-wit: on the 10th day of March, 1968, with force and arms, in the County aforesaid, unlawfully and feloniously did make an assault upon the body of one Johnny Bryant, and him the said Johnny Bryant, then and there unlawfully and feloniously put in fear and danger of his life, and then and there unlawfully, feloniously, and violently did steal, take, and carry away from the person and against the will of the said Johnny Bryant, certain personal property, to-wit: approximately $70.00 good and lawful currency of the United States of America of the value of $70.00 DOLLARS the property of the Red Ace. Petroleum Co., a corporation, said robbery being accomplished by the use of a deadly weapon, to-wit: A 22 caliber rifle; contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State of Tennessee.

/s/ Noel R. Bagwell
Attorney General

13238

ARMED ROBBERY

STATE

*vs*

DENNIS STEPHEN DUNCAN, RICHARD A. BROOKS

KENNETH ALBRIGHT
Prosecutor

WITNESSES SWORN:

Josephine Hinton
Kenneth Albright

A TRUE BILL

/s/ [Illegible]
Foreman Grand Jury

TO THE CLERK:

Summon the following witnesses for the State:

Kenneth Albright
Mrs. Herbert Hinton
Mr. Herbert Hinton
Johnny Bryant
William Tate 291-7700
W. R. James
James Bryant

/s/ Noel R. Bagwell
Attorney General

IN THE CRIMINAL COURT
FOR MONTGOMERY COUNTY
AT CLARKSVILLE, TENNESSEE

[Filed 12-20-68, Howell C. Smith, Jr., Circuit Court Clerk, by /s/ Rachel Phipps, D.C.]

STATE OF TENNESSEE

*vs*

RICHARD A. BROOKS and DENNIS STEPHEN DUNCAN

PLEA

Now come the defendants, who for plea in the above styled case say that they have been once put in jeopardy for the offense which they now stand charged.

In support of their plea the defendants would show to the Court that on July 16, 1968, they were put to trial upon an indictment charging that on March 10, 1968, they robbed one Johnny Bryant of Seventy Dollars ($70.00) belonging to the Red Ace Petroleum Company, and that this robbery was accomplished by the use of a deadly weapon, to-wit: a gun, to-wit: a pistol. A copy of said indictment is made an exhibit to this Plea and is to be considered a part of this Plea to the same extent as it would be if it were copied verbatim herein. (Exhibit 1) To this indictment the defendants did plead not guilty. Prior to entering their plea, the jury was sworn, the indictment was read to the jury, and the defendants waived formal arraignment, all is shown by the transcript of the original trial which is made an exhibit to this Plea and is to be considered as fully as if it were copied verbatim herein. (Exhibit 2).

The State then proceeded to call its first witness, Kenneth Albright, who was asked, "Now, what type of gun were you looking for?" to which Mr. Albright answered, "A 22 rifle, bolt action." To this counsel for the defendants objected saying, "Your Honor, I think at this stage we are going to enter an objection and ask that the jury be excused." The jury was then excused from the courtroom and counsel for the defendant stated:

"This indictment charges the defendants with armed robbery. That this robbery was accomplished with the use of a weapon, to-wit: a gun, to-wit: a pistol. We feel that any information as to a rifle is immaterial in this case." (Transcript original trial, Exhibit 2 herein, pp. 6 and 7).

After much discussion the jury was again called back into the courtroom and the Judge instructed the jury as follows:

"Gentlemen of the jury: The State in this case, by indictment, charge the defendants with Armed Robbery stating in the indictment that said robbery was accomplished by the use of a deadly weapon, to-wit: a gun, to-wit: a pistol. The State has now moved the Court for a directed verdict by the jury. It appearing that the indictment in stating that the deadly weapon was a pistol is an error and the State is unprepared to proceed any further, because of the fact that an error has been made in the indictment and it should have been a rifle instead of a pistol.

"Now, the State has moved that the jury be directed to find, or to acquit, the defendants of that charge because of that particular, which I have explained to you. The Court is directing you then to find, or to acquit, the defendants of the charge in view of that error in the indictment." (Transcript of original trial, Exhibit 2 herein, p. 75.)

The verdict of the Court was then entered in the official records of the Criminal Court of Montgomery County, Tennessee, all as shown by decree in Minute Book 45, Page 348, a photostatic copy of which is made an Exhibit to this Plea and is to be considered as if copied verbatim herein. (Exhibit 3.)

Then at the August term of the Criminal Court of Montgomery County, Tennessee, the Grand Jury for the State of Tennessee again indicted the defendants herein, and said indictment charging that on March 10, 1968, the defendants robbed one Johnny Bryant of Seventy

Dollars ($70.00) belonging to the Red Ace Petroleum Company, and that this robbery was accomplished by the use of a deadly weapon, to-wit: a gun, to-wit: a 22 calibur rifle, all of which is shown in the indictment, a copy of which is made an exhibit herein and which is to be considered as if copied verbatim herein. (Exhibit 4).

The defendants allege that their acquittal on the first indictment was lawful and that it would be in violation of Article I, Sec. 10 of the Constitution of the State of Tennessee for them to have to stand trial on the same offense a second time.

Respectfully submitted,

/s/ Rodger N. Bowman
RODGER N. BOWMAN
Attorney for Defendant
Dennis Stephen Duncan

/s/ Brandon Ingham
BRANDON INGHAM
Attorney for Defendant
Richard A. Brooks

I certify that a true copy of this Plea was delivered to the Office of the Attorney General, Noel Bagwell, on the same date that it was filed with this Court.

/s/ Rodger N. Bowman
RODGER N. BOWMAN

IN THE CRIMINAL COURT
FOR MONTGOMERY COUNTY
TENNESSEE, AT CLARKSVILLE

[Filed 2-10-69, Howell C. Smith, Jr., Clerk,
by /s/ D. H.]

STATE OF TENNESSEE

—*vs*—

RICHARD A. BROOKS and DENNIS STEPHEN DUNCAN

## AMENDED PLEA

Now comes the defendants, Richard A. Brooks and Dennis Stephen Duncan, and pray that they be allowed to file this Amended Plea in the above styled case.

The defendants wish to amend their plea by adding to the last paragraph of page three (3) by striking the period after second time, and adding a coma and, "and that this would be a violation of United States Constitution, Fifth Amendment.

II.

For further plea, Defendants say that they are not guilty of those things charged in the indictment.

Respectfully submitted,

/s/ Rodger N. Bowman
RODGER N. BOWMAN
Attorney for
Dennis Stephen Duncan

/s/ Brandon Ingham
BRANDON INGHAM
Attorney for Defendant
Richard A. Brooks

I certify that a copy of this plea was delivered to the Office of the Attorney General, Noel Bagwell, on the same date that it was filed with this Court.

/s/ Brandon Ingham

# IN THE CRIMINAL COURT OF MONTGOMERY COUNTY, TENNESSEE

## #13238 ARMED ROBBERY

[Filed 3-17-69, Howell C. Smith, Jr., Clerk, by /s/ Carrie Heath]

STATE OF TENNESSEE

*vs*

RICHARD A. BROOKS & DENNIS STEPHEN DUNCAN

## ANSWER

Comes now the State of Tennessee by Noel R. Bagwell, District Attorney General, Montgomery County, Tennessee, and for answer to the plea filed by the defendants in the above styled case says that the state admits that the defendants were first indicted for Armed Robbery by the use of a deadly weapon, to-wit: A pistol, as set out in their plea, and that this case was disposed of all as set out in their plea, and that the defendants were again indicted for Armed Robbery by the use of a deadly weapon, to-wit: A 22 Rifle, all as set out in the defendant's plea.

However, the state denies that all the above constitutes once in jeopardy or double jeopardy and states that evidence sufficient for a conviction upon the first said indictment would be insufficient for a conviction upon the second said indictment, or in other words, evidence sufficient to convict on one indictment would be insufficient in the other. Therefore, the defendants have not been heretofore or ever before put in jeopardy on the indictment upon which they stand charged in this case.

This the 17th day of March, 1969.

/s/ Noel R. Bagwell
NOEL R. BAGWELL
District Attorney General
Clarksville, Tennessee

#13238 Armed Robbery

STATE OF TENNESSEE

*vs.*

DENNIS STEPHEN DUNCAN, RICHARD A. BROOKS

"TRIAL & RESPITE"

Came the Attorney General on behalf of the State and the defendants, in Person and by counsel, Rodger Bowman and Brandon Ingham, and they being arraigned at the bar and charged upon the bill of indictment, pleads that they have been once put in jeopardy for the offense which they now stand charged and Not Guilty to the charges therein contained, and for their trial place themselves upon the Country and the Attorney General doth the like.

And whereupon to try this cause came a jury of good and lawful men, citizens of Montgomery County, to-wit: Paul T. Yarbrough, Morris G. Stanley, Robert L. Mills, Jr., Howard R. Hewitt, Billy L. Batson, Etheridge M. Mann, Cecil H. Picard, Joe L. Richardson, Herbert L. Morrison, Horace E. Hollis, John W. Jerles, Robert A. Stophel, who being duly elected, impaneled, and sworn to well and truly try the issues joined in this cause took their seats in the jury box and the hearing was begun.

Whereupon, the jury was excused from the Courtroom and argument presented by counsel for defendants and the state concerning the defendants' plea, that they have been once put in jeopardy for the offense which they now stand charged. The Judge upon hearing the argument after due consideration denied the plea and the jury returned and the case proceeded on the defendants' plea of Not Guilty.

And after a portion of the defendants' proof, it appearing to the Court that there was not sufficient time to complete the hearing of the cause, the Court after instructing the jury not to discuss this cause with any one nor permit others to discuss same in their presence,

places them in charge of the officer and ordered a respite in the proceedings until tomorrow morning at nine o'clock.

Approved for Entry:

/s/ Noel R. Bagwell
NOEL R. BAGWELL
District Attorney

/s/ Rodger Bowman
RODGER BOWMAN

/s/ Brandon Ingham
BRANDON INGHAM
Attorneys for Defendants

Court thereupon adjourned until tomorrow morning at Nine O'clock.

/s/ WILLIAM O. BEACH
Judge

STATE OF TENNESSEE
MONTGOMERY COUNTY

Wednesday Morning March 19, 1969

Court met at nine o'clock pursuant to adjournment with the Honorable William O. Beach, Judge, present and presiding when the following proper proceedings were had and entered of record, to-wit:

#13238 Armed Robbery

STATE OF TENNESSEE

*vs.*

DENNIS STEPHEN DUNCAN, RICHARD A. BROOKS

"TRIAL, VERDICT & MOTION FOR NEW TRIAL"

Came again the Attorney General on behalf of the State and the defendants, in person and by counsel, Rodger Bowman and Brandon Ingham, and they being arraigned at the bar and charged upon the bill of indictment, pleads that they have been once put in jeopardy for the offense which they now stand charged and Not Guilty to the charges therein contained, and for their trial place themselves upon the Country and the Attorney General doth the like.

And whereupon to try this cause came a jury of good and lawful men, citizens of Montgomery County, to-wit:

1. Paul T. Yarbrough
2. Morris G. Stanley
3. Robert L. Mills, Jr.
4. Howard R. Hewitt
5. Billy L. Batson
6. Etheridge M. Mann
7. Cecil H. Picard
8. Joe L. Richardson
9. Herbert L. Morrison
10. Horace E. Hollis
11. John W. Jerles
12. Robert A. Stophel

who being duly elected and sworn to well and truly try the issues joined in this cause, and true deliverance make according to the law and evidence took their seats in the jury box.

Whereupon, after arguments of counsels and the charge of the Court, the jury retires to the jury room to consider of thei. verdict, and after due consideration thereof, they return into open Court and on being polled and asked if they have agreed, they say upon their oaths that they find the defendants, Dennis Stephen Duncan and Richard A. Brooks, Guilty of Armed Robbery and fix their punishment at confinement in the State Penitentiary for a period of ten (10) years.

Thereupon, the defendants move the Court to set aside the verdict of the Jury and grant a new trial, the hearing of which to be agreed upon by counsels.

3-19-69

Approved for Entry:

/s/ Noel R. Bagwell
NOEL R. BAGWELL
Attorney General

/s/ Rodger Bowman
RODGER BOWMAN

/s/ Brandon Ingham
BRANDON INGHAM
Attorneys for Defendants

IN THE CRIMINAL COURT
FOR MONTGOMERY COUNTY
TENNESSEE, AT CLARKSVILLE

13238

[Filed 3-27-69, Howell C. Smith, Jr., Circuit Court Clerk, by /s/ Dixie Hanisen, D.C.]

STATE OF TENNESSEE, COMPLAINANT

*vs*

DENNIS STEPHEN DUNCAN and RICHARD A. BROOKS, DEFENDANTS

## MOTION FOR NEW TRIAL

Comes now the Defendant, Dennis Stephen Duncan, and moves the Court to set aside and vacate the verdict of the jury and grant him a new trial herein upon the following facts, to-wit:

1. Because there is no evidence to support the verdict;
2. Because the verdict is contrary to the law applicable to the cause;
3. Because the verdict is against the greater weight or preponderence of the evidence;
4. Because the Court erred in overruling the Defendant's plea that he had once been put in jeopardy for the offense with which he now stands charged;
5. Because the Court erred in not granting a mistrial when Kenneth Albright stated from the witness stand that we did not want all the statements in the record as one implicated the other;
6. Because the Court erred in allowing the confession of Dennis Stephen Duncan to be introduced into evidence, as the confession was not voluntarily given, and it waq taken in violation of his constitutional rights;
7. Because the Court erred in instructing the jury during cross examination that there was no law requiring that a confession be taken in writing and the jury

should disregard any implications made by counsel for the Defendants that it should be so taken; and

8. Because the Judge instructed the jury to disregard the testimony of Dennis Stephen Duncan in regard to his former trial and the results thereof.

WHEREFORE, The Defendant moves the Court to set aside and vacate the verdict of the jury and grant him a new trial.

Respectfully submitted,

/s/ Rodger N. Bowman
RODGER N. BOWMAN
Attorney for Defendant,
Dennis Stephen Duncan

I certify that a true copy of the above motion was delivered to Mr. Noel Bagwell on the date that it was filed with the Court.

/s/ Rodger N. Bowman

Monday, February 2, 1970

BE IT REMEMBERED That a Court of Criminal Appeals begun and held at the Court Building in the City of Nashville on the first Monday of February, 1970, it being Monday, February 2, 1970, present and presiding The Honorable Presiding Judge Mark A. Walker and Associate Judges W. Wayne Oliver, Charles Galbreath, Oris D. Hyder, John A. Mitchell, Robert K. Dwyer and William S. Russell, when the following proceedings were had and entered of record, to-wit:

* * * *

IN THE COURT OF CRIMINAL APPEALS
NASHVILLE

Montgomery County
(No. 13238 Below)

Offense: Armed Robbery
Reversed and Dismissed

RICHARD A. BROOKS and DENNIS STEPHEN DUNCAN

*vs.*

STATE OF TENNESSEE

## JUDGMENT

Came the plaintiffs in error, Richard A. Brooks and Dennis Stephen Duncan, by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Montgomery County; and upon consideration thereof this Court is of opinion that there is reversible error on the record in that the pleas of former jeopardy filed by the plaintiffs in error should have been sustained, and that the second trial was violative of their constitutional guarantees against being twice tried for the same offense as prohibited by the Fifth Amendment to the Constitution of the United States and by Article I, Section 10 of the Constitution of this State.

It is, therefore, ordered and adjudged by this Court that the judgment of the Court below be reversed, the verdict of the jury set aside, and the plaintiffs in error discharged.

The cause is remanded to the Criminal Court of Montgomery County for the execution of the judgment of this Court and for the collection of the costs of the Court below, for all of which, let procedendo issue.

The State of Tennessee will pay the costs of the appeal, which will be certified to the proper officer for payment in the manner provided by law.

The Clerk of this Court will furnish duly certified copies of this judgment to the Sheriff of Montgomery County and to the Warden of the State Penitentiary. 3/4/70. (Mitchell, J., Dissenting)

PROCEDENDO 13238

STATE OF TENNESSEE

---

To the Honorable Judge of the Criminal Court of Montgomery County, Holding and Presiding at Clarksville, Tennessee:

WHEREAS, in our Court of Criminal Appeals, at Nashville, at its February Term, 1970, it was adjudged and ordered in the cause of

RICHARD A. BROOKS and DENNIS STEPHEN DUNCAN

*vs.*

STATE OF TENNESSEE

appealed to our said Court from said Criminal Court that the same be remanded thereto for further proceedings and final determination therein.

THESE ARE, THEREFORE, To require you, the Court as aforesaid, that you proceed with the execution of this Judgment of our said Court of Criminal Appeals, by such further proceedings in your Court as shall effectuate the objects of this order to remand, and attain the ends of justice.

WITNESS, RAMSEY LEATHERS, Clerk of said Court at office in Nashville, the first Monday of February, 1970.

/s/ Ramsey Leathers
Clerk

By _____
D. C.

THE COURT OF CRIMINAL APPEALS
OF TENNESSEE
JACKSON

No. ———

[Filed Mar. 4, 1970, Ramsey Leathers, Clerk.
Court of Criminal Appeals]
Montgomery County
Hon. William O. Beach, Judge

RICHARD A. BROOKS and DENNIS STEPHEN DUNCAN,
PLAINTIFFS IN ERROR

*v.*

STATE OF TENNESSEE, DEFENDANT IN ERROR

*For Plaintiffs in Error:*

BRANDON INGHAM
(for Brooks)
Glenn Building
Clarksville, Tennessee

RODGER A. BOWMAN
(for Duncan)
Glenn Building
Clarksville, Tennessee

*For Defendant in Error:*

DAVID M. PACK
Attorney General of
Tennessee

EVERETT H. FALK
Assistant Attorney General
Nashville, Tennessee

NOEL R. BAGWELL
District Attorney General
Courthouse
Clarksville, Tennessee

Opinion Filed: _____

Reversed & Dismissed
ROBERT K. DWYER
Judge

## OPINION

Richard A. Brooks and Dennis Stephen Duncan, having been found guilty of armed robbery by a jury in the Criminal Court of Montgomery County, with a resulting sentence of confinement for ten years in the State Penitentiary, appeal their convictions. Through privately-retained counsel they assign error which will be sustained, setting aside the conviction.

The facts reflect that an armed holdup was perpetrated on the attendant of Red Ace Petroleum Company located in Clarksville, Tennessee. The holdup occurred on March 10, 1968. The weapon used was a .22 caliber bolt-action rifle. The sum of $70 was taken, according to the testimony of the victim Johnny Bryant. The investigation made resulted in the apprehension of Brooks and Duncan as being the parties responsible for this crime. There is a sufficiency of evidence in this record to sustain the jury's finding of guilt.

The defendants' assignment of error which must be sustained is based on pleas entered and overruled of former jeopardy.

The record reveals that the defendants were indicted during the June term of court by the Grand Jury of Montgomery County for committing this armed robbery. The indictment, in substance, material to our consideration, charges Brooks and Duncan committed an armed robbery on March 10, 1968, upon the person of Johnny Bryant and against his will and by fear took the sum of $70, the property of the Red Act Petroleum Company, ". . . said robbery being accomplished by the use of a deadly weapon, *to-wit: A Gun to-wit: a pistol.*" (emphasis added)

The case came on to be heard on July 16, 1968, with the Honorable Sam E. Boaz presiding by interchange for the Honorable William O. Beach, Judge of the Criminal Court for Montgomery County. A jury was selected, impaneled and sworn to try the issues, and the indictment, as outlined, was read to the jury. The attorney general called his first witness, the investigating officer who testified in response to a question on direct exam-

ination from the attorney general that in his investigation he was looking for a .22 caliber bolt-action rifle as the weapon used to perpetrate the holdup. An objection was made by counsel for the defendants to any proof pertaining to a rifle when the averment in the indictment allegated the robbery to have been committed by the use of a dangerous weapon, to wit: a *gun*, to wit: a *pistol*.

The objection was sustained after a hearing out of the presence of the jury. The attorney general informed the court that the averment as to the pistol was his mistake and in view of it being in the indictment and the court's ruling in regards to proof pertaining to the rifle being admitted he could not proceed. After discussion about the matter with the court the attorney general moved the court to direct a verdict of not guilty. This motion of the attorney general was made over the objection of counsel for the defendants who asked that their objections be noted. The jury was brought in and the court explained why the trial was not proceeding and directed them to return a verdict of not guilty as to the defendants, which verdict was returned and entered into the minutes of the court.

During the August term of court of 1968 another indictment was returned by the Grand Jury for Montgomery County charging the defendants with committing the same robbery as allegated in the original indictment. The same date was alleged, the same victim, the same amount of money, and property of the same company. The only allegation not the same as found in the original indictment was the type weapon used. In this latter indictment the weapon alleged to have been used was, "*. . . a deadly weapon, to wit: A 22 caliber rifle.*" (emphasis added)

On March 17, 1969, the defendants were tried upon this indictment. A plea was filed on behalf of both defendants interposing a plea of former jeopardy in that they had been in jeopardy before for the offense of which they now stand charged. This plea was heard and overruled by the Honorable William O. Beach, Judge of the Criminal Court of Montgomery County. The trial re-

sulted in verdicts of guilty and confinement for ten years as to each defendant.

The contention of each defendant is that the plea of former jeopardy entered should have been sustained. They have both filed excellent briefs in this record to sustain their assignments. The attorney general has likewise filed an excellent brief and submits his without any recommendation as to the invalidity or validity of the defendants' contentions of former jeopardy. In all candor he relates to the court that it is a serious question. Our research reflects that this is a question of first consideration in this State.

The State and defendants rely upon *Etter* v. *State*, 185 Tenn. 218, 205 S.W.2d 1, as their authority as to when jeopardy attaches. In that case the following language may be found at page 3:

> "Practically all authorities agree that jeopardy begins when the accused is put upon trial before a court of competent jurisdiction, upon an indictment sufficent in form and substance to sustain a conviction, and the jury has been impaneled and sworn."

This is the situation to be found in this record on the trial of the indictment returned in the June term, which indictment alleged the offense was committed by a *pistol*. There can be no question that the defendants were and had been in jeopardy at this trial.

The State and defendants both cite *State ex rel. Anderson* v. *Winsett*, 217 Tenn. 564, 399 S.W.2d 741, as to the proposition that the 1955 amendment to the robbery statute did not operate to make armed robbery a separate and distinct offense. In that case the following language may be found at page 568:

> ". . . By so adding this increased punishment for the increased gravity of the crime does not create a separate or distinct offense, but merely provides for increased punishment of such offender because of the presence of aggravating circumstances."

Then it must follow that the averment as to a "pistol" and then to a "rifle" in the indictments does not and

did not create, by the misuse of one, separate and distinct offenses. The offense perpetrated—"robbery" upon the person of the victim, Johnny Bryant—remained still one offense. In *Eager* v. *State*, 205 Tenn. 166, 325 S.W. 2d 815, the following language may be found at page 819:

> ". . . In other words it seems that the double jeopardy proposition is directed to the identity of the offense and not to the act."

In *Dowdy* v. *State*, 158 Tenn. 364, 366, the following language may be found:

> ". . . and when the facts necessary to convict on a second prosecution would necessarily have convicted on the first, then the first prosecution to a final judgment will be a bar to the second."

There can be no question that a valid verdict could have been returned on the original indictment.

The State, in its reply brief, calls to our attention *Hite* v. *State*, 17 Tenn. 356. We have reviewed that authority and find the following language at page 377:

> ". . . You cannot aver an impossibility, and it is an impossibility that the stealing of a note payable at the Mechanics and Traders' Bank should be the same offense with that of stealing one payable at the Merchants and Traders' Bank."

We must agree with the holdings in that case when we find they were speaking of separate and distinct offenses.

We also find the following language in that authority at page 371:

> "A great and leading principle in criminal jurisprudence is that, where a man has been pronounced not guilty on a valid indictment, he cannot again be put upon his trial for the same offense."

The State has also called to our attention *Young* v. *State*, 185 Tenn. 596, 206 S.W.2d 805, wherein when there developed at the trial a variance between the proof and the indictment with reference to the ownership of

the building, as well as that of the personal property, a verdict of not guilty was returned. A new trial and indictment alleging ownership of the property and the building in a corporation as opposed to it being named in an individual in the original indictment then brought about a conviction. A plea of former jeopardy was entered and overruled. Our Supreme Court had this to say in that case:

> "Thus, if there be a material variance between the averments, the two prosecutions are separate as a matter of law."

With this holding we agree. The variance in the ownership of the building and property was in the original indictment in an individual; and, in the second, ownership was placed in a corporation. We can see where there was and found to be a material variance in that record. In this record we have one offense; namely, robbery perpetrated on March 10, 1968, on the person of Johnny Bryant, and as a result of that robbery money in the amount of $70 was taken. In the second indictment it is still, from our review of the authorities quoted and read, one offense.

There can be no question that under our law a trial court is vested with authority to discharge and enter a mistrial in the orderly administration of justice. Some of the conditions arising in a trial which will give a trial the right to exercise this authority may be found enumerated in *Etter* v. *State*, 185 Tenn. 218, 223, 205 S.W. 2d 1. In this record a mistrial was not entered. A verdict of not guilty was returned by a jury lawfully sworn to try the issues.

In 15 Am. Jur., Section 359, at page 38, the following may be found:

> "... It has been said that the test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense."

In 22 C.J.S., Section 266, the following language may be found:

". . . Under the Fifth Amendment, a verdict of acquittal is final, ending an accused's jeopardy; once a person has been acquitted of an offense he cannot be prosecuted again on the same charge."

In *Green* v. *State*, 78 S.Ct. 221, 223, 355 U.S. 188, the following may be found:

"'* * * the plea of *autrefoits acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offense.'

"Substantially the same view was taken by this Court in *Ex parte Lange*, 18 Wall. 163, at page 169, 21 L.Ed. 872:

'The common law not only prohibited a second punishment for the same offense, but it went further and forbid a second trial for the same offense, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted.'

"The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

As outlined we, in reviewing the record in this cause, are satisfied with the sufficiency of the evidence as to their guilt.

We therefore conclude that the defendants were in jeopardy at the first trial, and over their objections the trial was halted and a verdict of not guilty as to each was returned by that jury. The second trial was, under our holdings, violative of their constitutional guaran-

tees against being twice tried for the same offense as prohibited by the Fifth Amendment to the Constitution of the United States and by Article I, Section 10 of the Constitution of this State.

Our courts have not been hesitant to set aside judgments when a jury properly sworn and impaneled to hear and try the issues have been discharged contrary to the law. In *Ward* v. *State*, 20 Tenn. 191, decided in 1839, our Supreme Court had this to say:

> ". . . To sustain the judgment under such circumstances would be to endanger the right of trial by jury and violate principles well settled by authority in Europe and the United States."

We cannot approve a practice of having a jury acquit and then obtaining another indictment when there is an acknowledged mistake. To borrow a phrase from *Ball* v. *United States*, 163 U.S. 662, 16 S.Ct. 1192, we would then condone a policy of "toties quoties." This may not be done.

The right not to be put in jeopardy a second time for the same offense is as important as the right to trial by jury and is guarded with as much care. *Holt* v. *State*, 160 Tenn. 366, 371.

The judgment of the trial court is hereby reversed and the defendants discharged.

/s/ Robert K. Dwyer
ROBERT K. DWYER

Concur:

/s/ William S. Russell
WILLIAM S. RUSSELL

John A. Mitchell dissented and filed herewith a dissenting opinion.

# THE COURT OF CRIMINAL APPEALS OF TENNESSEE JACKSON

[Filed Mar. 4, 1970, Ramsey Leathers, Clerk. Court of Criminal Appeals]

Montgomery County

Hon. William O. Beach, Judge

Armed Robbery

RICHARD A. BROOKS and DENNIS STEPHEN DUNCAN, PLAINTIFFS IN ERROR

*v.*

STATE OF TENNESSEE, DEFENDANT IN ERROR

## DISSENTING OPINION

I respectfully dissent. The facts are accurately summarized in the majority opinion.

In this case the defendants Richard Brooks and Dennis Stephen Duncan were first indicted on a charge of armed robbery of Johnny Bryant of $70.00 belonging to the Red Ace Petroleum Company accomplished by the use of a deadly weapon, to wit: a gun, to wit: a pistol, on March 10, 1968.

They were brought to trial before the Criminal Court of Montgomery County, Tennessee, on July 16, 1968, when a jury was duly selected and sworn to try the defendants upon their pleas of not guilty to the charge contained in that indictment.

The State called its first witness Kenneth Albright of the Division of Investigation of the Clarksville Police Department who after being introduced, and before any evidence was given that would even remotely connect the defendants with the robbery, he testified he commenced his investigation and was looking for someone and a vehicle that fit the description given him by the

victim and was looking for a white Chevrolet station wagon and a .22 caliber bolt action rifle.

At this juncture defendants entered an objection, the jury was excused and considerable discussion took place in open court between the trial judge, the district attorney and defendant's counsel.

The defendants through their counsel insisted that in as much as the indictment charged robbery with a pistol any evidence that it was done by use of a rifle was inadmissible and immaterial.

The attorney general stated that the allegation that the robbery was committed by the use of a pistol was an error that it should have alleged a rifle was the weapon used.

Defense counsel stated the type of weapon alleged to have been used was a very important element of the proof that was required to convict. That the type of weapon being described in the indictment is the matter that goes with the proof, and that they reserved the right to demand that the State prove every essential element necessary in its charge of robbery.

The district attorney was allowed a short recess. After which, in open court out of the presence of the jury, he declared he had found an old case in 46 Tennessee that held, "When an indictment charges the killing to have been done with a particular weapon, the prosecution will not be permitted to prove it was done with a weapon of a totally different character. Thus, evidence of a dagger will support the averment of a knife. The evidence of a knife will not support the averment of a pistol.

The district attorney further insisted that if the indictment alleges a pistol and proof of a rifle will not sustain a conviction in an indictment that alleges a pistol, then we are certainly entitled to reindict.

Defense counsel pressing the objection raised by defendants cited *Johnson* v. *State*, 148 Tenn. 196, as follows:—

> "But no allegation, whether it be necessary or unnecessary, whether it be more or less particular, which is descriptive of the identity of that which is

legally essential to the charge in the indictment, can never be rejected as surplusage.

* * * *

"That if the necessary allegation is made minute in description, it must satisfy the descriptive as well as the main part, since one is essential to identify the other, the Court is saying that if he is charged with robbery with a pistol, even though it is unnecessarily minute in description that it is necessary that it be proved that it was with a pistol."

Defense counsel demanded that the State prove the case as charged in the indictment.

The trial judge held that in view of the fact that the indictment clearly charged the offense of armed robbery was committed with a deadly weapon, to wit: a pistol, he could not allow any evidence to show that it, the deadly weapon, was a .22 caliber rifle. The defendant's objection to any proof of a rifle being used in the armed robbery when the indictment charged a pistol, was sustained.

The district attorney then stated he would just ask that the case be dismissed.

After further discussion, pro and con, the district attorney further stated:

"ATTORNEY GENERAL: . . . if the Court has ruled, and I understand it has, that there can be no conviction in this case if we show that the robbery was accomplished with the use of a rifle, when the indictment says it was accomplished by the use of a pistol. That is such a variance that there could be no conviction as it stands. So, I would think that we would just as well conclude, because that is what we would have to prove."

The district attorney then made a motion that the Court direct a verdict that the jury find for the defendants due to the variance in the indictment.

"JUDGE: . . . Is the State itself moving for the Court to direct the jury to find for the defendants?

"ATTORNEY GENERAL: Yes, sir, that's it. Due to this variance here in the indictment.

"JUDGE: Let me have the indictment, will you? I take it then that the State is moving the Court to direct the jury to acquit the defendants on the grounds of the offense of Armed Robbery with a gun, to wit: a pistol. On the grounds that the deadly weapon that the State is prepared to prove was actually a rifle instead of a pistol?

"ATTORNEY GENERAL: Yes, sir.

* * * *

"ATTORNEY GENERAL: Well, I don't see, with these jurors here, I don't see why they can't be told just for the sake of letting them know what is going on. I think that these twelve men have got a right to know what is going on here. Exactly the reason why, because they are intelligent men and I don't see any reason for keeping them in the dark for something that there can be no earthly reason for.

* * * *

The trial judge then stated to the jury:

"The State in this case, by indictment, charge the defendants with Armed Robbery stating in the indictment that said robbery was accomplished by the use of a deadly weapon, to wit: a gun, to wit: a pistol. The State has now moved the Court for a directed verdict by the jury. It appearing that the indictment in stating that the deadly weapon was a pistol is an error and the State is unprepared to proceed any further, because of the fact that an error has been made in the indictment and it should have been a rifle instead of a pistol.

"Now, the State has moved that the jury be directed to find, or to acquit, the defendants of that charge because of that particular, which I have explained to you. The Court is directing you then to find, or to acquit, the defendants of the charge in view of that error in the indictment."

Whatever else may be said the conclusion to me is inescapable that the motion of the attorney general for a directed verdict of not guilty was brought about by defendants' insistence that the allegations in the indictment were at variance with the proof, and when the attorney general, faced with the ruling of the Court, decided he could proceed no further on that indictment, elected to dismiss the case and seek a new and correct indictment.

The minute entry disposing of the case shows the case was dismissed and the not guilty verdict entered because of the error in the indictment.

In this case the district attorney was faced by the insurmountable obstacles of the defendants' objection and the Court's holding in sustaining the objection that he would not admit the proof of armed robbery with a rifle when the indictment charged robbery by use of a pistol. The defendants, at that time, insisted there was a fatal variance in the indictment, the trial judge must have thought so too when he sustained the defendants' objection and when, on motion of the attorney general, he solemnly wrote into the judgment that he directed the jury to acquit the defendants of the charge in view of the error in the indictment.

The following is a copy of the minutes of the Court on the first indictment:

IN THE CRIMINAL COURT
FOR MONTGOMERY COUNTY
TENNESSEE, AT CLARKSVILLE

#13-182—Armed Robbery

STATE OF TENNESSEE

*vs.*

DENNIS STEPHEN DUNCAN and RICHARD A. BROOKS

"Came the Attorney General on behalf of the State and the defendants, in person and by counsel, and they being arraigned at the bar, pleaded not-guilty as charged in the indictment and for their trial placed themselves on the country and the Attorney General doth the like, and whereupon to try this cause came a jury of good and lawful men, citizens of Montgomery County, to wit:

| | |
|---|---|
| James C. Bunnell, Jr. | Jimmy P. Dark |
| George Barbee | Forest Suiter |
| William R. White | John B. Settle |
| Charles M. Keel | Jeffrey R. Harp, Jr. |
| Billy E. Jackson | Edgar P. Hogue |
| William J. Ireland | John H. Key |

who being duly elected, impaneled and sworn to truly try the issues join in this cause and true deliverance make according to law and evidence, and sets in the jury box.

"At the conclusion of the State's proof, the State moves the Court to instruct the jury to find for the Defendants and return a verdict of not-guilty as the State is not prepared to prove a pistol was used in the robbery. Your Honor is pleased to grant said request and explains to the jury as follows:

> "'Gentlemen of the jury, the State in this case by indictment charge the Defendants with Armed Robbery stating in the indictment that said robbery was accomplished by the use of a deadly weapon, to wit: a gun, to wit: a pistol and the State has now moved

the Court for a directed verdict by the jury, it appearing that the indictment in stating that the deadly weapon was a pistol is in error and the State is unprepared to proceed any further because of the fact that an error has been made in the indictment and it should have been a rifle instead of a pistol. Now then, the State has moved that the jury be directed to find or to acquit the Defendant of that charge because of that particular, which I have explained to you and the Court is directing you then to find, or to acquit the Defendants of the charge in view of that error in the indictment.'

"Whereupon, the jury consider of their verdict, and after due consideration thereof, they return into open court, and asked if they agreed, they say upon their oaths that they find the Defendants, Dennie Stephen Duncan and Richard A. Brooks, not guilty.

SAM E. BOAZ
/s/ SAM E. BOAZ

Approved for entry:

/s/ NOEL R. BAGWELL
NOEL BAGWELL
Attorney General

There was no trial on the merits. The State had just commenced to examine the first witness when the proceedings were stopped, upon the objections of the defendants, before any evidence was introduced that would in any wise connect the defendants with the robbery charged in the indictment.

On the first trial the contention of the defendants was that the first indictment was at variance with the proof. This being sustained by the trial judge, the attorney general moved for a directed verdict of acquittal on that indictment which charged robbery by the use of a pistol. Then after a new indictment was obtained charging robbery by the use of a rifle, upon which they were con-

victed, they now insist that the indictments were identical.

It appears to me that if the allegations concerning the weapon used was a material averment in the first indictment as insisted by the defendants on the first trial then they must accept the fact that the allegation concerning the weapon used was a material averment in the second indictment; thus, two different indictments requiring different proof.

I agree that the law is as stated in *Hite* v. *State*, 17 Tenn. 357, that:

> "'. . . whenever the same evidence will support both indictments, it is a good plea; and that, unless the first indictment were such that the prisoner might have been convicted upon it by proof of the facts contained in the second indictment, an acquittal on the first is not a bar.' 17 Tenn. at 364.
>
> * * * *
>
> ". . . If the crimes are so distinct that evidence of the one will not support the other, it is as inconsistent with reason as it is repugnant to the rules of law to say that they are so far the same that an acquittal of the one shall be a bar to the prosecution of the other . . .
>
> "Now, to apply these principles to the present case. The first indictment charges the prisoner with having stolen, taken, and carried away one bank-note of the Planters' Bank of the State of Tennessee, payable on demand at the *Merchants and Traders'* Bank of New Orleans. Upon this he was acquitted. The second charges him with having stolen, taken, and carried away one bank-note of the Planters' Bank of the State, payable on demand at the *Mechanics* and Traders' Bank of New Orleans.
>
> * * * *
>
> "It is certainly true that the place of payment formed no material part of the description of the note, and need not have been stated in the bills of indictment, as has been decided in (377) the case

of the King *v.* Johnson, 2 Leach, 1103; King *v.* Simpkin, 2 Starkie, 429; King *v.* Milnes, 2 East's P. Cr. 602. But it is equally true that, having been stated, it became necessary to prove it; otherwise, it would not have appeared that the note charged to have been stolen was the same as that described in the bill of indictment. This position is supported by many authorities. In Roscoe's Criminal Evidence, page 77, it is said that if a person or thing necessary to be mentioned in an indictment is described with circumstances of greater particularity than is requisite, yet those circumstances must be proved; as, if a man were charged with stealing a black horse, the allegation of color, though unnecessary, yet, being descriptive of that which is material, could not be rejected.

"In Dorsett's case, 5 Rogers, 77, referred to in note 1 to Roscoe's Criminal Evidence, 77, it was held that, where an indictment for coining alleges possession of a die made of iron and steel, proof of one made of zinc and antimony was a fatal variance; and, in the case of The United States *v.* Porter, 3 Day's Cases, 283, that an allegation in an indictment which is not impertinent or foreign to the case must be proved, though a prosecution for the same offense might be supported without such allegation, and that the court will be more strict in requiring proof of the matters alleged in criminal than in civil cases. These authorities fully sustain the position that the places of payment specified in the bills of indictment are made material and must be proven; from which it follows that the proof necessary to sustain the one bill of indictment could not by an possibility support the other, as the places are not the same, but different, and that the offence charged in the last bill of indictment is not the same with that charged in the first."

In that case the first indictment charged larceny of a bank note payable at *Merchants* and Traders' Bank of New Orleans. He was acquitted on that indictment and

then indicted for larceny of a bank note payable at *Mechanics* and Traders' Bank of New Orleans. Apparently the draftsman of the first indictment erroneously wrote *Merchants* in the first indictment, instead of *Mechanics*.

In this Brooks and Duncan case the draftsman wrote "pistol" in the first indictment when he should have written "rifle". The Court in *Hite* v. *State* held the offenses were not legally identical and held that a note payable at the Mechanics and Traders' Bank was not the same as a note payable at Merchants and Traders' Bank.

It is my opinion that an indictment which charges robbery committed by the use of a pistol is not the same as robbery committed with a rifle.

Whether the majority opinion is correct that the robbery creates only one offense, it requires different evidence and more evidence to convict of armed robbery, moreover it requires a distinct and separate allegation in the indictment.

If it be insisted that the weapon is material and relevant only to the extent of the punishment then I insist it is of tremendous importance because it raises the minimum sentence to 10 years and the maximum-punishment to death by electrocution.

I am unable to escape the conclusion that there was a material variance in the two indictments which required different evidence.

The Court held the two offenses were not legally identical in that a note payable at Mechanics and Traders' Bank was not the same as a note payable at Merchants and Traders' Bank. Then robbery by the use of a pistol is not the same as robbery by the use of a rifle. How can it be said that a pistol is the same as a rifle. The defendants did not think so on the first trial nor did the trial judge think so.

In *Young* v. *State*, 185 Tenn. 696, the Court said:

> "These two defendants were convicted of housebreaking and larceny, with their maximum punishment fixed at five years in the penitentiary.
>
> "The defendants do not make any question as to the facts but contend that the trial judge erroneously overruled a plea of *autrefois acquit*.

"It appears that at the October term, 1946, the defendants were indicted in the circuit court of Hamblen County by an indictment charging them with housebreaking and larceny. The building claimed to have been broken into was set out in the indictment as the business house of Leon Clifton, and the property claimed to have been taken was alleged to be that of said Leon Clifton.

"At the trial it developed that there was a variance between the proof and the indictment with reference to the ownership of the building, as well as that of the personal property, and a verdict of not guilty was returned.

"At the same term of court, and on the following day, another indictment was returned against the defendants containing two counts and charging them with breaking into the storehouse of Clifton's, Inc., a corporation. The State concedes that the building broken into and the property alleged to have been taken were the same in each of the indictments. The trial judge overruled the plea.

"(1) In *Hite* v. *State*, 17 Tenn. 357, the Court laid down the rule that to entitle a prisoner to the benefit of the plea, it is necessary that the crime charged be precisely the same in each indictment, and said at page 378 of 17 Tenn.:

> "'. . . But, if the variances are in those things which are material, *autrefois acquit* cannot be pleaded in bar—either the first indictment was ineffectual, and therefore the acquittal of no avail, or the record will prove not applicable to the evidence, and therefore the objection is needless; . . .'

"Thus, if there be a material variance between the averments, the two prosecutions are separate as a matter of law.

"(2) In 22 C.J.S., Criminal Law, sec. 268, the author states in substance that if the accused be acquitted upon the ground of material variance he

cannot plead the acquittal as a bar, for he has never been in jeopardy, and when tried on a new indictment the crime alleged is not the same crime as in the former indictment.

"(3) In the present case the first indictment placed ownership in an individual, and the second indictment placed ownership in a corporation in which the individual is a stockholder."

In *Witt* v. *State*, 46 Tenn. 5, cited in the Attorney General's brief the court said:

"'Where the indictment charges the killing to have been done with a particular weapon, it is not permitted to prove that it was done with a weapon of a totally diverse character. "Thus, evidence of a dagger will support the averment of a knife, but the averment of a knife will not support the averment of a pistol." 2 Whart. Crim. Law, sec. 1059.' 46 Tenn. at 8."

I am unable to reconcile the majority opinion with the holdings in the Witt case and the Hite case. Evidence of a rifle will not support an allegation of a pistol.

I am unable to find that robbery committed with a rifle is the same as robbery committed with a pistol.

The defendants are clearly guilty of the enormous crime of robbery by the use of a deadly weapon.

There is ample, competent evidence of admissions and confessions which show their guilt beyond a reasonable doubt and the jury so found.

In *State* v. *Malouf*, 199 Tenn. 496, a case where a reversal was ordered because the trial judge erroneously sustained a plea of former jeopardy, the former Chief Justice Hamilton S. Burnett, declared:

". . . Certainly the failure to grant a mistrial would have resulted in a miscarriage of justice because the State would not have had an opportunity to present this material evidence which it wanted and was kept from doing due to no fault of the State.

* * *

"We, after giving the matter very careful thought and much study, are satisfied that under the circumstances of this case the trial judge properly exercised his discretion in granting a mistrial and that by doing so the defendant was not put in double jeopardy."

Former Chief Justice Burnett also declared in *Etter* v. *State*, 185 Tenn. 224, that:

"(8, 9) In our effort to see that the rights of persons accused of crimes are protected, we should not overlook the fact that the people also have interests that should be safeguarded. Both the accused and the people have a right to have the case of the accused tried by an impartial jury . . .

"(10) How can the accused say he has been injured, that any injustice has been done? We frankly cannot see how. At the succeeding term he clearly had all rights that he originally had in the selection of a new jury. He was not prejudiced by the evidence of the prosecution which had been introduced. The fact is he should be materially benefited. Then too, we know that ordinarily the longer a trial of the kind is postponed, the better for the accused."

I am unable to concur in a conclusion based upon a doubtful technicality that in no way invades the rights, constitutional or otherwise, of the defendants, which will have the effect of setting free two defendants who have been proven guilty of armed robbery. The principle of the protection of individuals against double jeopardy, which I believe to be one of the most solid and sacred in our system of jurisprudence does not require such a strained construction. The plea of *autrefois acquit* should only be successful when the defendant is, in fact, in danger of double jeopardy. I do not believe this to be true in the instant case.

I would affirm the judgment at the trial court.

/s/ John A. Mitchell
JOHN A. MITCHELL
Judge

Monday, December 1, 1969

BE IT REMEMBERED That a Supreme Court of errors and appeals begun and held at the Court Building in the City of Nashville on the First Monday of December, 1969, it being the First Day of December, 1969, present and presiding the Honorable Chief Justice Ross W. Dyer, and Associate Justices Chester C. Chattin, Larry Creson, Allison B. Humphreys and George F. McCanless, when the following proceedings were had and entered of record, to-wit:

* * * *

SUPREME COURT, NASHVILLE

Montgomery Criminal

No. 13238 Below

Offense: Armed Robbery

Judgment of the Court of Criminal Appeals Set Aside; Judgment of the Trial Court Affirmed

RICHARD A. BROOKS and DENNIS STEPHEN DUNCAN

*vs.*

STATE OF TENNESSEE

## JUDGMENT

This cause coming on to be heard upon the entire record from the Court of Criminal Appeals, Middle Division at Nashville, petition for the writ of certiorari filed on behalf of the State of Tennessee having been heretofore granted, briefs and argument of counsel; upon consideration whereof the Court is of opinion that on authority of *Hite* v. *State*, 17 Tenn. 357, (1836) there is reversible error in the judgment of the Court of Criminal Appeals; and it is accordingly so ordered and adjudged by this Court.

It is, therefore, ordered and adjudged by this Court that the judgment of the Court of Criminal Appeals is set aside and the judgment of the trial court is affirmed; and that Richard A. Brooks and Dennis Stephen Duncan, for their offense of armed robbery, be delivered to the Warden of the State Penitentiary or his agent, and be by him committed to the Penitentiary of the State of Tennessee, and there confined at hard labor for a term of ten years, commencing on the day of their reception at said Penitentiary.

The sentence of imprisonment will be credited with the time the defendants spent in jail pending this appeal. The number of days of such confinement of each defend-

ant will be certified to the Warden by the Clerk of the Court below.

The defendants will pay the costs of the cause accrued in this Court and in the Courts below, and execution may issue from this Court for the costs of the appeal. A procedendo will issue to the said Criminal Court of Montgomery County directing that Court to proceed with the collection of the costs of the cause accrued therein in the manner provided by law.

The Clerk of this Court will issue a duly certified copy of this judgment to the Sheriff of Montgomery County, which will be his authority for delivering Richard A. Brooks and Dennis Stephen Duncan to the Warden or his agent; and also a duly certified copy hereof to the Warden of the State Penitentiary, who will at once proceed to execute this judgment. 10/5/70.

PROCEDENDO

STATE OF TENNESSEE

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To the Honorable Judge of the Criminal Court of Montgomery County, Holding and Presiding at Clarksville, Tennessee:

WHEREAS, in our Supreme Court, at Nashville, at its December Term, 1969, it was adjudged and ordered in the cause of

RICHARD A. BROOKS and DENNIS STEPHEN DUNCAN

*vs.*

STATE OF TENNESSEE

appealed to our said Court from said Criminal Court that the same be remanded thereto for further proceedings and final determination therein.

THESE ARE, THEREFORE, To require you, the Court as aforesaid, that you proceed with the execution of this Judgment of our said Supreme Court, by such further proceedings in your Court as shall effectuate the objects of this order to remand, and attain the ends of justice.

WITNESS, RAMSEY LEATHERS, Clerk of said Court at office in Nashville, the first Monday of December, 1969.

/s/ Ramsey Leathers
Clerk

By _____
D. C.

Montgomery Criminal
Honorable William O. Beach, Judge

[Filed Oct. 5, 1970, Ramsey Leathers, Clerk, Supreme Court]

STATE OF TENNESSEE, PETITIONER

*vs.*

RICHARD A. BROOKS and DENNIS STEPHEN DUNCAN, RESPONDENTS

| *For Petitioner:* | *For Respondents:* |
|---|---|
| Hon. David M. Pack<br>Attorney General & Reporter<br>State of Tennessee | Hon. Brandon Ingham<br>(for Brooks)<br>Clarksville, Tennessee |
| Hon. Everett H. Falk<br>Assistant Attorney General<br>Nashville, Tennessee | Hon. Rodger A. Bowman<br>(for Duncan)<br>Clarksville, Tennessee |

## OPINION

Defendants were jointly indicted, and convicted, of armed robbery, and given ten year sentences. The Court of Criminal Appeals reversed, holding that the trial judge should have sustained defendants' plea of former jeopardy. We granted certiorari, and reverse on authority of Hite v. State, 17 Tenn. 357. (1836).

Defendants were first indicted for robbing one Johnny Bryant of money belonging to the Red Ace Petroleum Company by the "use of a deadly weapon, to wit: a gun, to wit: a pistol". At the trial the State's evidence was that the robbers used a .22 caliber rifle. On this variance, on the State's motion, a directed verdict of not guilty was entered. Defendants were reindicted for robbery of Bryant with a rifle, and at their trial on this indictment contended by pleas of former jeopardy that their not guilty verdict under the first indictment, for robbery with a pistol, prevented their trial on the second indictment under both the state and federal constitutions. This

plea was overruled, the defendants put to trial, and the result was a verdict of guilty of armed robbery.

With one judge dissenting, the Court of Criminal Appeals reversed defendants' convictions on their pleas of former jeopardy. We think this was error, and hold, on authority of Hite v. State, supra; Young et al v. State, 185 Tenn. 596, 206 S. W. 2d 805 (1947); Brown v. State, 186 Tenn. 378, 210 S. W. 2d 670 (1948); and Wilson v. State, 200 Tenn. 309, 292 S. W. 2d 188 (1956), that the judgment of the trial court must be affirmed.

Both the Tennessee and the United States Constitutions provide that no person shall be twice put in jeopardy of life or limb for the same offense. Tennessee Constitution, Article 1, § 10; U. S. Constitution, Amendment 5. It is well settled that jeopardy attaches when the accused is put upon trial before a court of competent jurisdiction, upon an indictment sufficient in form and substance to sustain a conviction, and the jury has been impaneled and sworn. Etter v. State, 185 Tenn. 218, 205 S.W. 2d 1 (1947). See generally, Green v. United States, 355 U.S. 184, 2 L.Ed. 2d 199 (1957).

In Hite v. State, supra, it is said: "It is a sacred principle of our law that no man shall be placed in jeopardy twice for the same offense. Therefore, where a man has been pronounced not guilty on a valid indictment, he cannot be again indicted upon a charge of having committed the same supposed crime. But, while we guard with great care this rule of defense, so consonant with justice and reason, we must at the same time with equal care see that it is not perverted from its intended purposes and made to protect from punishment those whom the law never designed should fall within its operation. To entitle a prisoner to the benefit of the plea of autrefois acquit, it is necessary that the crimes charged in the last bill of indictment be precisely the same with that charged in the first, and that the first bill of indictment is good in point of law. The true test by which the question whether such a plea is a sufficient bar may be tried is whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first".

This proposition is summarized in 22 C.J.S. Criminal Law, § 268, in these words: "No matter now irregular the proceedings have been, one who has been tried in a competent court and acquitted on the merits cannot be placed on trial for the same offense; but the acquittal must have been on the merits; and the rule does not apply where the acquittal was for a material variance." The text under this headnote continues: "The effect of a material variance between the allegations of the indictment and the proof is to entitle the accused to an acquittal on the particular indictment, but he is still liable to be tried for his crime; and, if accused is acquitted by direction of the court on the ground of material variance, he cannot plead acquittal as a bar to a second prosecution for he has never been in jeopardy, and when tried on the new indictment the crime then alleged is not the same crime as in the former indictment." (This quotation is not in the replacement volume).

With respect to variance and its materiality we find the following in Wharton's Criminal Law and Procedure, Vol. 5, Ch. 84, § 2054:

> "In the law of criminal pleading, a variance is a disagreement between the allegations in the indictment or information and the proof, as to some matter which is legally essential to the charge. By the early common law, very strict conformity was required between the allegations of the indictment or information and the proof, even in minor and immaterial respects, but the former rule has been greatly relaxed, and the courts no longer regard the consequences of variance with such seriousness as formerly."

Tennessee continues to adhere to the strict common law rule of proof of allegations, as laid down in Hite v. State, supra. That rule is, and again we quote:

> "It is certainly true that the place of payment (of a note the defendant was charged with stealing) formed no material part of the description of the note, and need not have been stated in the bills of

indictment, as has been decided (citing cases). But it is equally true that, having been stated, it became necessary to prove it; otherwise it would not have appeared that the note charged to have been stolen was the same as that described in the bill of indictment. This position is supported by many authorities. *In Roscoe's Criminal Evidence, page 77, it is said that if a person or thing necessary to be mentioned in an indictment is described with circumstances of greater particularity than is requisite, yet those circumstances must be proved;* as, if a man were charged with stealing a black horse the allegation of color, although unecessary, yet being descriptive of that which is material, could not be rejected.

"In Dorsett's case, 5 Rogers, 77, referred to in Note 1 to Roscoe's Criminal Evidence, 77, it was held that, where an indictment for coining alleges possession of a die made of iron and steel, proof of one made of zinc and antimony was a fatal variance; *and, in the case of United States v. Porter, 3 Day's Cases, 283, that an allegation in an indictment which is not impertinent or foreign to the cause must be proved, though a prosecution for the same offense might be supported without such allegation,* and that the court will be more strict in requiring proof of the matters alleged in criminal than in civil cases." (Emphasis added)

This has been the rule in Tennessee ever since it was first announced. In Brown v. State, supra, at page 389, 27 Am. Jur., is approvingly quoted as saying that a variance is immaterial "if the allegation was surplusage". While backhanded, so to speak, this statement is in conformity with *Hite.* In Wilson v. State, supra, the question was whether there was a material variance with respect to the first indictment which had charged the theft of brass rollers, when in fact the rollers were of bronze. This Court quoted with approval from *Hite* the portion of the opinion we have quoted above, again indicating our intention of this Court to adhere to the strict rule.

If we are to continue to follow the strict rule, there is no doubt but that there was a material variance in the trial on the first indictment. The "deadly" character of the weapon was in issue under this statutory crime so its description was not surplusage. And the description helped identify with greater particularity the crime in question.

So the question is, whether we shall continue to follow the strict rule; and we think we should.

That this rule is technical, is beyond question. But, it need not be despised on that account. For, it does provide a more exact standard than does the modern rule, and thus there is less chance of error in determining the question of materiality of a variance. Moreover, the rule is eminently logical: in the instant case, for example, it is perfectly possible (however unlikely) that the accused could have committed two distinct robberies of the same parties on the same day, one at rifle and the other at pistol point. It hardly needs pointing out that the strict rule is of no disadvantage to the accused. It affects both sides equally, (as would any other rule, applied, as it must be, consistently as a test both for acquittal for material variance and a plea of former jeopardy). Finally, it cannot be denied that this strict rule actually works to the advantage of the accused in that it puts on the State the burden of proving all of the allegations of the indictment that are not surplusage, thereby removing all reasonable doubt as to the identification of the particular crime.

It remains to be considered whether defendants' federal constitutional rights under the double jeopardy provisions of the Fifth Amendment were violated in view of the recent holding in Benton v. Maryland, 89 S. Ct. 2056 (1969), overruling Palko v. Connecticut, 302 U. S. 319, 82 L. Ed. 288, 58 S. Ct. 149 (1937), and applying federal double jeopardy standards to the states through the Fourteenth Amendment.

Federal cases recognize the effect of a material variance, just as we do. And the test applied by that jurisdiction, as by this, is whether the cases are provable by the same evidence. United States v. Hunter, 123 F.

Supp. 1 (D.C. Md. 1954); Ex parte Rhinelander, 11 F. Supp. 298 (D.C.W.D. Tex. 1935); United States v. Phelan (D.C. Mass. 1917). The only difference is that under our rule the measure of the evidence is more strictly applied. However, our strict rule, being in the first instance to identify more certainly the crime, and requiring strict proof on the part of the State, when consistently applied as a test for both variance and double jeopardy, will affect equally both the state and the defendant, and in our opinion not offend the Fourteenth Amendment.

The judgment of the Court of Criminal Appeals is set aside and the judgment of the trial court is affirmed.

/s/ Humphreys, J.
HUMPHREYS, J.

Concur:

DYER, C. J.,
CHATTIN, J.,
CRESON, J.,
MCCANLESS, J.,—
not participating

Montgomery Criminal

[Filed Jan. 18, 1971, Ramsey Leathers, Clerk, Supreme Court]

RICHARD A. BROOKS and DENNIS STEPHEN DUNCAN

*vs.*

STATE OF TENNESSEE

## OPINION ON PETITION TO REHEAR

A Petition to Rehear has been filed with the Court, and after due consideration, we are of opinion it should be denied.

The arguments made by the petitioner were either made at the time or were available to him when the case was before the Court. And, on this last point, such new arguments as have been advanced are upon authority this Court considered in arriving at its opinion, except as to the recent case of Ashe v. Swenson, 397 U. S. 436, 25 L.ed. 2d 469, 90 S. Ct. 1189 (1970), which overruled Hoag v. New Jersey, 356 U. S. 464, 2 L. ed. 2d 913, 78 S.Ct. 829 (1958), and applied the federal rule of collateral estoppel, as embodied in the Fifth Amendment guaranty against double jeopardy, to the states.

However, after due consideration of Ashe, the Court is of opinion it has no application to the question whether there has been double jeopardy where the first indictment is void for variance.

The petition to rehear argues the cases Young, et al v. State, 185 Tenn. 596, 206 S.W. 2d 805 (1947); Brown v. State, 186 Tenn. 378, 210 S. W. 2d 670 (1948), and Wilson v. State, 200 Tenn. 309, 292 S. W. 2d 670 (1956), are factually distinguishable from the present case. This is true. However, these cases were cited by the Court simply to show the viability of Hite v. State, 17 Tenn. 357 (1836). So the distinguishment of these cases from *Hite* is of no consequence.

While we commend the diligence of defense counsel, and the valor with which his argument is presented, we cannot agree therewith and as indicated, deny the petition to rehear.

/s/ Humphreys, J.
HUMPHREYS, J.

Concurring:

DYER, C. J.,
CHATTIN, J.,
CRESON, J.,
MCCANLESS, J.

SUPREME COURT, NASHVILLE

Montgomery Criminal

No. 13238 Below

RICHARD A. BROOKS and DENNIS STEPHEN DUNCAN

*vs.*

STATE OF TENNESSEE

## JUDGMENT ON PETITION TO REHEAR DENIED

This cause coming on further to be heard on a petition to rehear and reply thereto; and after due consideration, the Court is of opinion that said petition should be, and hereby is, denied.

The Clerk of this Court will issue a duly certified copy of this judgment to the Clerk of the Criminal Court of Montgomery County and a certified copy to the Sheriff of Montgomery County, which will be his authority for delivering Richard A. Brooks and Dennis Stephen Duncan to the Warden or his agent; and also a duly certified copy hereof to the Warden of the State Penitentiary, who will at once proceed to execute the judgment of this Court rendered on October 5, 1970, wherein the judgment of the trial court was affirmed. 1/18/71.

OFFICE OF CLERK OF THE SUPREME COURT
FOR THE MIDDLE DIVISION
OF THE STATE OF TENNESSEE

I, RAMSEY LEATHERS, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and complete copy of the JUDGMENT ON PETITION TO REHEAR of said Court, pronounced at its December term, 1970, in case of RICHARD A. BROOKS and DENNIS S. DUNCAN against STATE OF TENNESSEE as appears of record now on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court at office in the Supreme Court Building at Nashville, on this, the 18th day of January, 1971.

/s/ Ramsey Leathers
Clerk

By _____
Deputy Clerk

# SUPREME COURT OF THE UNITED STATES

## No. 70-5122

DENNIS STEPHEN DUNCAN, PETITIONER

*v.*

TENNESSEE

On petition for writ of certiorari to the Supreme Court of the State of Tennessee, Middle Division.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 12, 1971

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